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Book Review

THE AMERICANIZATION OF SWISS LEGAL CULTURE: HIGHLIGHTS OF CULTURAL
ENCOUNTERS IN AN EVOLVING TRANSATLANTIC HISTORY OF LAW
(Jens Drolshammer ed., Stämpfli Publishers, 2016)[†]

*Reviewed by Johannes Reich**

We have witnessed a sharp rise in the quest for a methodologically sound analysis of the “migration,”¹ “transfer,”² and “borrowing”³ of concepts between different legal systems.⁴ At the time of its foundation as a modern federal state in 1848, the Swiss Confederation (Switzerland) formed a republican island in an ocean of monarchies in the heart of Europe. The foundation of the United States of America, in turn, may be viewed as the first large-scale experiment in federal republicanism in the modern era, having been initiated at a time when what today constitutes Switzerland was a rather loose confederation of (semi-)sovereign republics.⁵ This backdrop marks an important starting point for what Jens Drolshammer, the editor of the volume under review, refers to in his introductory essay as “travels’ and ‘impacts.’”⁶ The term “travels” describes the exchange of political and legal concepts between the

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1. See, e.g., Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 CONN. L. REV. 907 (2005); Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 1, 13–16 (Sujit Choudhry ed., 2006).

2. See Gunther Teubner, *Legal Irritants*, 61 MOD. L. REV. 11, 12 (1998) (criticizing the view that legal institutions may be “transferred” or “transplanted” from one legal context to another while remaining substantially unchanged).

3. See Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT’L J. CONST. L. 296 (2003).

4. See RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 1–4 (2014); see also James Q. Whitman, *The Neo-Romantic Turn*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 312, 312 (Pierre Legrand & Roderick Munday eds., 2003) (voicing “some gentle doubts” with regard to this trend).

5. See THOMAS MAISSEN, *DIE GEBURT DER REPUBLIC. STAATSVERSTÄNDNIS UND REPRÄSENTATION IN DER FRÜHNEUZEITLICHEN EIDGENOSSENSCHAFT* 569–92 (2006) (tracing the emergence of republicanism in Switzerland during the early modern era).

6. Jens Drolshammer, *Swiss Law and Legal Culture and the Process of Americanization*, in THE AMERICANIZATION OF SWISS LEGAL CULTURE 35, 55, 58, 61 (Jens Drolshammer ed., 2016).

two countries whereas “impacts” denotes the influence of American law on Swiss legal culture and vice versa.⁷ An example of an “impact” on American law is the Progressive Era adoption in various American states of Swiss-inspired instruments such as popular initiatives and referenda.⁸ It was in the aftermath of the two World Wars that, according to Drolshammer, the tide turned and “Swiss law and legal culture” entered into an ongoing yet widely unnoticed “process of Americanization.”⁹

After the introductory essay, the volume is designed as a two-part *anthology* reproducing fifty-five documents from the year 1775 to the present. Part I highlights the travels and impacts of Swiss legal culture on the legal culture of the United States. It contains twenty-six texts, ranging from legal scholarship to court decisions, materials deriving from the legislative process, historic documents such as excerpts from the *Federalist Papers*, along with works of literature, history, and political science. Part II seeks to illustrate analogous travels and impacts, though of American legal culture on Swiss legal culture. It consists of a similarly diverse set of twenty-nine reprinted papers. Each of the fifty-five texts in the anthology is preceded by a short introduction that might prove especially helpful for those materials reprinted in French or German.

Part of a comprehensive project entitled “Anthology of Swiss Legal Culture,”¹⁰ the book advances the thesis that “Swiss legal culture” underwent a process of *Americanization*.¹¹ This claim merits careful consideration. Some isolated areas of Swiss law and legal practice have indeed been modeled on concepts derived from American legal traditions. This is especially true for the contractual design of major business transactions¹² and other fields of corporate law.¹³ It has also become increasingly common for both Swiss legal scholars and corporate lawyers to complete their education with a postgraduate degree awarded by an American law school.¹⁴ The United States judiciary has furthermore held to account both the Swiss federal government and Swiss banks for their respective policies during the years of national socialist dictatorship in Germany.¹⁵ More recently, American courts

7. See *id.* at 37, 46–48, 50–51.

8. William E. Rappard, *The Initiative, Referendum and Recall in Switzerland*, reproduced in *THE AMERICANIZATION OF SWISS LEGAL CULTURE*, *supra* note 6, at 397, 413–15 (illustrating the borrowing of constitutional ideas with regard to direct democracy).

9. Drolshammer, *supra* note 6, at 63, 66.

10. *THE ANTHOLOGY OF SWISS LEGAL CULTURE* (Thomas Cottier, Jens Drolshammer & Pascal Pichonnaz eds.), <http://www.legalanthology.ch> (last visited July 7, 2018).

11. See Drolshammer, *supra* note 6, at 48, 50–65.

12. NEDIM PETER VOGT & ROLF WATTER, *MERGERS & ACQUISITIONS IN SWITZERLAND* 19 (2d ed. 1995) (asserting “a clear trend towards importing Anglo-American practices in the merger and acquisition field into Switzerland”).

13. HANS-UELI VOGT, *KONVERGENZ VON GESELLSCHAFTSRECHTEN* 453–54 (2012).

14. See Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229, 232–34 (1991) (noting that “an average of 60% of highly qualified younger lawyers” working with large corporate law firms in Zurich and many legal scholars “have an American degree”).

15. See THOMAS MAISSEN, *VERWEIGERTE ERINNERUNG. NACHRICHTENLOSE VERMÖGEN UND SCHWEIZER WELTKRIEGSDEBATTE 1989–2004*, at 626, 633, 649, 660 (2005) (detailing Switzerland’s process of coming to terms with its own past against the backdrop of class actions filed by Holocaust survivors against Swiss banks in American courts).

have increased pressure on Switzerland to cooperate on tax matters.¹⁶ Given that the leading Swiss banks remain dependent on access to American financial markets, this pressure has led the Swiss federal parliament to abandon its controversial “banking secrecy law”¹⁷ with regard to foreign countries and in turn to adopt the global standard on the automatic exchange of information on financial accounts for tax purposes.¹⁸ The United States for its part has hitherto failed to provide for a comparable degree of transparency and cooperation.¹⁹

Whether these developments are evidence of the *Americanization* of Swiss legal culture as such is open to question. As a small open economy²⁰ structured by major linguistic and denominational cleavages,²¹ Switzerland has historically been outward looking in terms of law, culture, and trade. Though it is not a member of either the European Union (EU) or the European Economic Area, EU law has left its mark on the laws of Switzerland due to a closely knit network of bilateral treaties.²² With regard to private law, Switzerland is a civil law jurisdiction unlike the United States, which—with the partial exception of Louisiana—has inherited the common law tradition.²³ Swiss administrative law is generally modeled after its French and German equivalents: specialized administrative law courts, not ordinary courts, are the ones to review administrative action. Legal education in Switzerland by and large follows what is often called the “German model” understanding “law” as a science, or *Wissenschaft*, with distinctive and rigorous methods of its own. This approach stands in stark contrast to the American model of legal education. Drawing from the tradition of American Legal Realism, according to which “law” constitutes first and foremost an empirical rather than a normative phenomenon, American legal education emphasizes interdisciplinarity.²⁴ Yet American Legal Realism—arguably the most radical feature

16. See Patrick Emmenegger, *The Long Arm of Justice: U.S. Structural Power and International Banking*, 17 BUS. & POL. 473, 483–90 (2015).

17. See Sébastien Guex, *The Origins of the Swiss Banking Secrecy Law and Its Repercussions for Swiss Federal Policy*, 74 BUS. HIST. REV. 237 (2000).

18. See Patrick Emmenegger, *Swiss Banking Secrecy and the Problem of International Cooperation in Tax Matters*, 11 REG. & GOVERNANCE 24, 25, 35–36 (2017).

19. *Financial Transparency: The Biggest Loophole of All*, THE ECONOMIST (Feb. 20, 2016), <https://www.economist.com/news/international/21693219-having-launched-and-led-battle-against-offshore-tax-evasion-america-now-part>.

20. See PETER J. KATZENSTEIN, CORPORATISM AND CHANGE: AUSTRIA, SWITZERLAND, AND THE POLITICS OF INDUSTRY 84, 112–32 (1984) (examining the repercussions on the Swiss political system that Switzerland is a “small open economy”).

21. See Johannes Reich, *An Interactional Model of Direct Democracy: Lessons from the Swiss Experience* 18, 29 (Sept. 17, 2008) (unpublished manuscript), <https://ssrn.com/abstract=1154019>.

22. See Clive H. Church, *Continuities Within Change*, in SWITZERLAND AND THE EUROPEAN UNION 186, 190–98 (Clive H. Church ed., 2007); MATTHIAS OESCH, *EUROPARECHT* 611–71 (2015).

23. See KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 167–79 (Tony Weir trans., 3d ed. 1987) (assessing Swiss private law in comparative perspective).

24. See JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW* 982–88 (2009) (tracing the emergence of American legal education).

of American law and legal culture in a comparative perspective²⁵—has not migrated to Switzerland. Institutional design is another area where Switzerland has not been Americanized. Whereas the structure of the United States Congress served as a blueprint for Switzerland's bicameral parliamentary system,²⁶ other characteristic constitutional features of the Swiss Federal Constitution share few or no similarities with American legal culture. This is true for the limited scope of judicial review with regard to acts of the Federal Parliament,²⁷ the design of the executive branch (the Federal Council) as a "collegial body"²⁸ composed of seven members with equal powers,²⁹ or the wide range of instruments of direct democracy at the federal level.³⁰ Despite the undeniable impact of the United States Supreme Court case law on the conceptualization of fundamental rights by the Swiss scholarly community after World War II,³¹ it was Switzerland's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms³² in 1974 that proved decisive for the application of basic rights.³³

In light of these important exceptions to the book's claim, we should perhaps reframe the "*Americanization thesis*" with more nuance. The volume aims neither to quantify the impact of American law on Swiss legal culture nor does it purport to offer a theoretical framework to assess this phenomenon. Rather, the book represents a compilation of vastly diverse documents bearing witness to the vivid exchange of political ideas and legal concepts between two unlike "sister republics."³⁴ We can therefore read the book as both a resource for learning and an invitation.³⁵ It is a useful collection of materials that track the

25. See Johannes Reich, "*Originalismus*" als methodologischer Scheinriese und verfassungspolitische Konterrevolution, 65 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 713, 716, 721–24 (2017) (providing an appraisal from abroad).

26. WALTER HALLER, THE SWISS CONSTITUTION IN A COMPARATIVE CONTEXT 10–11, 124–25 (2d ed. 2016).

27. BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 190; see Johannes Reich, *Direkte Demokratie und völkerrechtliche Verpflichtungen im Konflikt*, 68 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖR] [HEIDELBERG J. INT'L L.] 979, 995–98 (2008) (offering a detailed assessment in comparative perspective).

28. BV, art. 177, para. 1.

29. *Id.* art. 175, para. 1; HALLER, *supra* note 26, at 143–46.

30. HALLER, *supra* note 26, at 108–12.

31. See ANDREAS KLEY, GESCHICHTE DES ÖFFENTLICHEN RECHTS DER SCHWEIZ 359–60 (2d ed. 2015) (identifying many influential Swiss judges and public law scholars who pursued degrees at Yale and Harvard in the 1960s and 1970s).

32. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

33. See generally Daniela Thurnherr, *The Reception Process in Austria and Switzerland*, in A EUROPE OF RIGHTS 311, 316–18, 351–58 (Helen Keller & Alec Stone Sweet eds., 2008) (giving a detailed evaluation of the influence of the Convention on rights in Switzerland).

34. James H. Hutson, "Swiss and American State Constitutions," excerpt from JAMES H. HUTSON, THE SISTER REPUBLICS: SWITZERLAND AND THE UNITED STATES FROM 1776 TO THE PRESENT (1991), reproduced in THE AMERICANIZATION OF SWISS LEGAL CULTURE, *supra* note 6, at 436, 439 (referring to an official the Library of Congress sent "to Switzerland in 1884 with instructions to collect 'everything relating to the history of the sister republic'").

35. See Drolshammer, *supra* note 6, at 45 (explaining that "[t]he Anthology is intended as a platform of knowledge . . .").

sources of legal influence between Switzerland and the United States. It also presents an opportunity for legal scholars to embark on one of the most important yet all too often neglected endeavors in comparative legal scholarship: to create a theoretical framework to evaluate the normative relevance of the relationship that this book has chronicled in its careful selection of materials. One can only hope that legal scholars will take up the invitation made by the book, its editor, and the larger "Anthology of Swiss Legal Culture."